



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

VIRGINIA LAW REVIEW

Published Monthly, During the Academic Year, by University of Virginia Law Students

Subscription Price, \$3.50 per Annum - - 50c per Number

Editorial Board.

ANSON W. H. TAYLOR, *President*.
THOMAS H. MIDDLETON, *Notes Editor*.
PHILIP M. PAYNE, *Decisions Editor*.
RICHARDSON BRONSON, *Book Review Editor*.
ROMULUS C. SMITH, *Virginia Editor*.
BLACKSTONE D. AYRES, *Ass't Virginia Editor*.
THOMAS L. PRESTON, *Ass't Virginia Editor*.
JOHN AMBLER,
MARSHALL ANDREWS,
AUBREY R. BOWLES, JR.,
T. MUNFORD BOYD,
ROBERT Y. BUTTON,
BRODNAX CAMERON,
IRVING E. CARLYLE,
FRANK P. CHRISTIAN, JR.,
AYLETT B. COLEMAN, JR.,

FRANK W. DAVIES,
F. BARTOW FITE, JR.,
SHIELDS M. GOODWIN,
EASTWOOD D. HERBERT,
WILLIAM C. HOWARD,
NELSON PHILLIPS, JR.,
JOHN E. RICHARDSON,
CURTIS SIMPSON,
TODD SMITH,
JOHN B. SPIERS,
FRANK S. TAVENNER, JR.,
J. HUME TAYLOR,
J. WHITCOMB WELCH,
ELLSWORTH WILTSHIRE,
SAMUEL B. WITT,
HARTER F. WRIGHT,

THEODORE S. COX, *Business Manager*.

ERNEST L. DYER, *Ass't Business Mgr.*

MCALISTER MARSHALL, *Circulation Mgr.*

HERBERT S. FALK, *Adv. Mgr.*

DAMAGES FOR MENTAL SUFFERING.—When may damages be allowed for mental suffering and what is the prerequisite to a valid claim for such damages—the true basis on which it should be founded?

There is much conflict and much confusion among the cases on this point and the general holdings may be roughly divided under four heads, more or less clearly defined and more or less consistently adhered to, *viz*:

First. Where, in addition to an independent cause of action, *physical* injury accompanied or was the proximate result of the mental suffering.¹

Second. Where in addition to an independent cause of action, defendant's conduct was characterized by "actual malice, oppres-

¹ Chicago Consol. Traction Co. v. Schritter, 222 Ill. 364, affirming judgment, 124 Ill. App. 578, 78 N. E. 820 (1906); Dulieu v. White, 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. Rep. (N. S.) 126, 50 Wkly. Rep. 76 (1901); Spade v. Lynn & Boston R. Co., 168 Mass. 285, 60 Am. St. Rep. 393 (1897); Grenada Bank v. Lester (Miss.), 89 So. 2 (1921); W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300 (1891).

sion, or bad motive", in which cases it is allowed as a part of *punitive damages*.²

Third. Only where there has been actual physical impact accompanying or causing the mental suffering.³ The reader will distinguish this case from the cases where the injury followed or was caused by the mental suffering.

Fourth. Where there is any independent cause of action and the mental suffering is a proximate result.⁴

This confusion results from a misconception of the true basis for such damages. As said in *Larson v. Chase*.⁵

"This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damages, is never a proper subject of compensation, when the correct ground was, that the act complained of was not an infraction of any legal right, and hence an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. * * * This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But where the wrongful act constitutes an infringement on a legal right,

² *Davis v. Standard Nat. Bk.*, 63 N. Y. S. 764, 50 App. Div. 210 (1900); *Am. Nat. Bank v. Morey*, 113 Ky. 857, 24 Ky. Law Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379 (1902); *Hickey v. Welch*, 91 Mo. App. 4 (1901); *Dunn v. W. U. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189 (1907); *Smith v. Atchison, etc.*, R. Co., 97 S. W. 1007, 122 Mo. App. 85 (1906); *Hall v. Jackson*, 24 Col. App. 225, 134 Pac. 151 (1913); *Wm. Small & Co. v. Lonergan*, 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976 (1909); *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775 (1912). See also *Grenada Nat. Bank v. Lester*, and *W. U. Tel. Co. v. Rogers*, *supra*, note 1.

³ *Canning v. Inhabitants of Williamston*, 55 Mass. (1 Cush.) 451 (1848); *Deming v. Ry. Co.*, 80 Mo. App. 152 (1899); *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475 (1900); *Ewing v. Pittsburg, etc., R. Co.*, 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709 (1892). See also *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005 (1905).

⁴ *Mutilation of husband's body. Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370 (1891). *Malicious Prosecution. Hamilton v. Smith*, 39 Mich. 222 (1878). *Seduction of daughter. Phillips v. Hoyle*, 4 Gray (Mass.) 568 (1855). *Trespass. Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759 (1868). *Wrongful exclusion from train. Cleveland, etc., R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245 (1901). *Sale of wrong ticket. Tex. & P. R. Co. v. Armstrong*, 93 Tex. 31, 51 S. W. 835 (1899); *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657 (1875). *Alienation of wife's affections. Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492 (1904); *Hartpence v. Rodgers*, 143 Mo. 623, 45 S. W. 650 (1898). *Slander. Finger v. Pollack*, 188 Mass. 208, 74 N. E. 317 (1905); *Van Ingen v. Star Pub. Co.*, 1 App. Div. 429, 37 N. Y. S. 114, 51 N. E. 1094 (1896); *Knowlend v. Guardian, etc., Co.*, 69 N. J. Law 670, 55 Atl. 287 (1903).

⁵ *Supra*, note 4.

mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." (Italics ours.)

And this, we think, is the true distinction. It will clarify the question if we first analyze the nature of damages allowed for mental suffering.

First. Are they nominal? Of course not. Nominal damages are allowed for the invasion of a legal right when no actual damage is suffered, and are merely a vindication of the right. But all the cases agree that before damages for mental suffering can be recovered there must be some violation of a legal right giving a cause of action independent of the mental suffering; therefore, if the mere vindication of the right is intended this can be accomplished without reference to mental anguish.

Second. May they properly be classed as punitive? Absolutely not. Punitive damages are not based on the injury to the plaintiff (though he must have suffered injury to have a cause of action) but on the malice, oppression or bad motive of the defendant. But mental suffering is an injury suffered by the plaintiff, and the suffering is neither increased nor diminished by the malice or bad motive of the defendant. I may commit a tort against you in ever so malicious a manner and you may recover nominal damages against me for an invasion of your right, or you may recover substantial damages for actual injury suffered, or punitive damages because of my malice, but if you have suffered no mental anguish because of my wrong you cannot add to the punitive damages under that head.

It follows, therefore, as a matter of course, that damages for mental suffering are *compensatory*. Yet we find the Court, in *Grenada Bank v. Lester*,⁶ saying:

"This court has decided repeatedly that damages for mental pain and suffering, such as humiliation and embarrassment, *disconnected from physical injury*, cannot be recovered, unless allowed *as a part of punitive damages*." (Italics ours.)

It will be noticed here that the Court treats such damages as being both punitive and compensatory, which is an anomaly, and that it places the right to recover therefor, not on the grounds of actual damages suffered following a violation of a legal right, but either (a) on the motive of the defendant, or, (b) upon the ground of *physical* damage suffered as a prerequisite. But we have seen that such damages, being strictly compensatory, have nothing to do with punitive damages and cannot properly be added under that head.

And, if mental suffering is recognized as a damage at all, why must physical injury either precede it or follow it as a natural

⁶ *Supra*, note 1.

consequence, as a prerequisite to recovery for the mental suffering, if we admit that it is the proximate and natural consequence of a violation of a legal right? This is absolutely indefensible on principle. The Court in *Spade v. Lynn, etc. R. Co.*, said:⁷

"We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and, if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not *accompanied* by any perceptible physical effects.

"It would seem, therefore, that the real reason for refusing damages from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." (Italics ours.)

Thus the Court admits that in reality it is merely an arbitrary rule. Argument is scarcely necessary to show the unfortunate effect of these decisions. The weakness of the objection can first be shown by saying that there are many cases where mental suffering of a high degree is bound to ensue, but from which no physical injury results; as in the case of a mother separated from her infant, or the mutilation of the body of a deceased husband.⁸ Moreover, for courts to deny justice, because of the difficulty of administering it, amounts to self-stultification. And the inconsistency is more apparent when we consider that no difficulty is experienced in computing damages for mental anguish when the technical prerequisites demanded do exist, and that it is allowed in all cases of slander, libel, seduction and breach of promise, if found by the jury to exist. And yet the Court, in *Davis v. Standard Bank*,⁹ in ruling that there could be no recovery for mental suffering and humiliation, caused by the wrongful dishonor of plaintiff's check, "unless the bank acted through malicious and wilful and improper motives," declared that the case was quite analagous to an action of slander!

The prerequisite demanded by the third line of cases, and the most irrational, is *actual physical impact*.¹⁰ This may be ever so slight, causing no actual injury at all and giving rise to only nominal damages in itself; but without it no recovery can be had for any amount of the keenest mental suffering. According to these cases it would seem that I may enter your home and destroy your property in a drunken rage, put you in great fear for your own life and great mental anguish for the lives of your children, or I may so frighten your wife as to cause a miscarriage, but because I have not touched your person you cannot recover from me for the *mental suffering* caused.

⁷ *Supra*, note 1.

⁸ *Supra*, *Larson v. Chase*.

⁹ *Supra*, note 2.

¹⁰ *Supra*, note 3.

Many of the cases which have held to this theory have cited *Victorian Ry. Com'rs v. Coultas*,¹¹ as authority, having doubtless been misled by a misconception of what was really decided in that case. What was decided was that,

"Damages arising from mere sudden terror *unaccompanied* by any actual physical injury but occasioning a nervous or mental shock cannot under such circumstances * * * be considered a consequence which in the ordinary course of things, would flow from the negligence of the gate-keeper." (Italics ours.)

In other words, all that was actually decided was that the injury, under the circumstances of that case, was too remote, and the court expressly declined to decide that *impact* was necessary. Moreover, the case has since been overruled by *Dulieu v. White*,¹² in which it was said:

"That fright—where physical injury is directly *produced* by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority." (Italics ours.)

The true ground, then, for the recovery of damages for mental suffering or fright, is as stated in *Larson v. Chase*,¹³

"Where the wrongful act constitutes an infringement on a *legal* right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." (Italics ours.)

And this is because such damages are *compensatory*, and because it is an ancient rule of law that when one violates the *legal* rights of another he is bound to make full *compensation* for all injuries flowing as a direct and natural result of his wrong-doing. Neither malice, nor punitive damages, nor physical impact, nor physical injury as a result of the mental suffering has anything to do with the case where the defendant has violated a legal right of the plaintiff, and the plaintiff asks only *compensatory* damages for mental suffering proximately resulting therefrom.

"Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions for tort. * * * The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness."¹⁴

¹¹ 13 App. Cas. 222, 52 J. P. 500, 57 L. J. P. C. 69, 58 L. T. Rep. (N. S.) 390, 57 Wkly. Rep. 129 (1888).

¹² *Supra*, note 1.

¹³ *Supra*.

¹⁴ *Meagher v. Driscoll*, *supra*, note 4.

The Court clearly stated the whole argument in *Craker v. Chicago, etc., R. Co.*¹⁵

"In actions of tort, as a rule, when plaintiff's right to recover is established, he is entitled to full *compensatory* damages. * * * And for that he is entitled to full *compensation, malice or no malice.* * * * In actions for personal tort, mental suffering, vexation, and anxiety are subjects of *compensation in damages.* * * * And we must hold that all mental suffering directly consequent upon tort, * * * is ground for *compensatory* damages in action for tort." (Italics ours.)

H. F. W.

WHEN MAY GARAGES BE ERECTED IN RESIDENTIAL DISTRICTS.—Where a municipal ordinance is adopted under a general welfare clause, but the method of exercising the power is left to the discretion of the city council, it is an established principle that the power must be exercised in a reasonable manner.¹ Municipal ordinances regulating garages within city limits appear to have been uniformly upheld as a proper exercise of the police power.²

Around those ordinances which make the erection of buildings such as garages depend in some measure upon the consent of adjoining property owners the cases are in hopeless conflict. Missouri held in *State v. Beattie*,³ where the opinion was written by the dissenting judge with strong reasons for his dissent, that an ordinance prohibiting the location of a livery stable on any block in St. Louis without the written consent of one half of the owners of the ground of the block was valid, but nine years later expressly overruled this decision,⁴ and since then has consistently viewed such legislation as delegated, unreasonable and hence void.⁵ Illinois, on the other hand, in an early case⁶ held that an ordinance which prohibited the erection of a livery stable, gas house, etc., within 200 feet of any block two thirds of which was devoted to residences, without the written consent of the majority of adjoining property owners, was valid and not a delegation of legislative power. This case has been followed by two cases involving the

¹⁵ *Supra*, note 4.

¹ 2 Dillon Munic. Corp. § 589.

² *People v. Village of Oak Park*, 266 Ill. 365, 107 N. E. 636 (1914); *People ex rel. Buscking v. Ericsson*, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D. 607, Ann. Cas. 1915C, 183 (1914); *In Re McIntosh*, 211 N. Y. 265, 105 N. E. 414, L. R. A. 1915D, 603 (1914); *Myers v. Fortunato* (Del.), 110 Atl. 847 (1920).

³ 16 Mo. App. 131 (1884).

⁴ *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 (1893).

⁵ *Hays v. City of Poplar Bluff*, 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D, 595 (1915).

⁶ *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325 (1896).